

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROSEMARY KIRKSEY,)
)
Plaintiff,)
) No. 4:08CV01765 FRB
)
v.)
)
)
ST. LOUIS COUNTY, MISSOURI,)
et al.,)
)
Defendants.)

MEMORANDUM AND ORDER

Presently before this Court is Defendants' Motion to Dismiss, filed pursuant to Federal Rule of Civil Procedure 12(b)(6). (Docket No. 17/ filed January 30, 2009). All matters are pending before the undersigned United States Magistrate Judge, with consent of the parties, pursuant to 28 U.S.C. § 636(c).

Plaintiff Rosemary Kirksey ("plaintiff") filed her original Complaint against defendants St. Louis County, Missouri; Mr. Dustin Poncin; and Mr. Harolton Clayborn¹ alleging damages resulting from the shooting death of her son, Byron Harmon, on November 16, 2003. Defendants subsequently filed the instant Motion to Dismiss, in which their sole argument centers around plaintiff's use of the word "unnecessary." Specifically,

¹Plaintiff alleges that Messrs. Poncin and Clayborn were, at the time relevant to the Complaint, employed by St. Louis County, Missouri as police officers.

defendants argue that plaintiff's Complaint is subject to dismissal because she alleged that the amount of force used was "unnecessary," when in fact cases such as this one are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. Defendants cite to paragraph 18 of plaintiff's original Complaint, in which she uses the word "unnecessary," and to paragraph 24, in which she incorporates all prior allegations by reference.

Subsequently, on February 9, 2009, plaintiff filed a First Amended Complaint, omitting the word "unnecessary" and alleging instead that the force used was not reasonably necessary. (Docket No. 22 at 3.)

Therefore, for all of the foregoing reasons,

IT IS HEREBY ORDERED that defendants' Motion to Dismiss (Docket No. 17) is **DENIED** as moot.



Frederick R. Buckles
UNITED STATES MAGISTRATE JUDGE

Dated this 15th day of May, 2009.